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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JASON M. KOZUP, Defendant and Appellant.	B293823 (Los Angeles County Super. Ct. No. LA080937)

APPEAL from a judgment of the Superior Court of Los Angeles County, Martin L. Herscovitz, Judge. Affirmed

Roberta Simon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Chung L. Mar and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jason M. Kozup of one count of stalking (Pen. Code, § 646.9),[1] one count of attempted extortion (§ 524), 14 counts of making criminal threats (§ 422) and three counts of felony vandalism (§ 594, subd. (a)).[2] On appeal Kozup contends the trial court committed prejudicial error in failing to instruct the jury sua sponte on the lesser included offenses of attempted criminal threat and attempted stalking. He also contends insufficient evidence supported his convictions for felony, as opposed to misdemeanor, vandalism. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The People's Case*

In July 2014 deputies from the Lost Hills station of the Los Angeles County Sheriff's Department (LASD) in Calabasas and the Ventura County Sheriff's Department responded to several calls involving Kozup. Kozup, agitated and on at least two of the occasions armed with a knife, thought he had been the target of a poison gas attack. He also believed the deputies were not properly doing their job.

On May 2, 2015 Kozup drove a rented red Mustang to what he believed was the Calabasas home of LASD Captain Patrick Davoren, who was assigned to the Lost Hills station. The new owner of the house told Kozup that Davoren no longer lived there. As Kozup was leaving, he saw three cars with government-exempt license plates in the driveway of a nearby residence. Kozup went over to the cars and slashed tires on each

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[1] Statutory references are to this code.

[2] Special allegations Kozup had used a deadly or dangerous weapon when committing the stalking and vandalism offenses were dismissed during trial.

of them. Two of the cars were unmarked FBI vehicles; the third was owned by FBI Special Agent James Peaco. One of Peaco's neighbors saw a man he identified at trial as Kozup stand over the cars, run toward a red Mustang and drive away. The damage to the tires was likely caused by a large knife or a machete-like weapon.

The following day Kozup started making telephone calls to the LASD Lost Hills station, demanding to speak to Captain Davoren. Because of the increasingly angry tone of the calls, LASD Lieutenant James Royal began an investigation. Transcripts of the calls that were the bases for the 14 counts of making a criminal threat, made between May 3 and May 7, 2015, as well as other calls made by Kozup to the Lost Hills station, were admitted in evidence; and recordings of several of the threatening calls were played for the jury.[3] Kozup gave his name

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[3] Messages charged as violations of section 422 and played for the jury include: On May 5, 2015 Kozup called the Lost Hills station and said, "Yeah, for the record, I'm a Christian Jew. I just wanted you to fucking know that you fucking pigs. Tell your boy to call the fucking Swat Team and I'm gonna take all of fucking niggers out single fucking handedly, every one of you fucks! not you . . . every one of those fucks, including Davoren, and six other of those fucking niggers are so dead, I'm gonna have their heads. I'm dragging them back in the back of my car. If my fucking cash isn't ready, let that nigger know it's on!" Later the same day Kozup said in a call, "I'm gonna send over an invoice of all the total cost of what it took to survive the event by Patrick Davoren's attempted murder, along with your six police officers. Um, and that invoice is to be paid in cash on Friday and if the money is not available, I'm personally coming down to take out Patrick Davoren and six of those officers." In another call less than an hour later, Kozup instructed the person answering the

and phone number on the calls and mentioned Colorado several times. He demanded money during the calls in progressively greater amounts.[4] In one call Kozup played music that included the sound of chainsaws and said he would saw off Davoren's head and take it back to Colorado.

As the calls continued, the LASD Lost Hills station was placed on high alert; and armed deputies were posted with orders to watch for any suspicious activities or individuals. In the final call on May 7, 2015 Kozup stated, "[T]here's a total of seven officers that are lined up this weekend for full execution. I swear to God it's gonna happen." Kozup was arrested in Colorado by FBI agents later that day.

Captain Davoren testified he had taken the threats personally and believed Kozup was going to try to kill him or injure members of his family or other deputies at the LASD Lost Hills station. When Davoren learned about the vandalism on the street where he used to live, the threats caused him even greater concern because Kozup was closer to him physically. Davoren relocated his family to put them out of harm's way and

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phone "to listen to this whole song and let [Davoren] know he's gonna have his fucking head cut-off this weekend." Ten minutes later Kozup called back, acknowledged that he knew his calls were being recorded, and said Davoren should be told, "[H]e has 24 hours to confirm that that fucking money is ready or his fucking head is coming back to Colorado on a fucking stick on the back of my fucking car! You fucking pigs!"

[4] In a call on May 7, 2015 Kozup warned, "So, every hour that I don't hear confirmation that my money's available, it's gonna increase five grand and right now it's at 65,000. There's a total of seven officers that are lined up this weekend for full execution. I swear to God it's gonna happen."

stayed alone at his home. Lieutenant John Lecrivain testified Davoren's demeanor changed beginning on May 3, 2015 and he seemed tired, frustrated and on-edge. Lieutenant Patrick Mathers observed that Davoren appeared to be scared.

Material from Kozup's phone, recovered after his arrest, included photographs of the house and vehicles Kozup believed belonged to Captain Davoren. Colorado law enforcement officials testified knives were obtained during a search of the car Kozup had been driving, as well as duct tape, a saw and hatchet and New Hampshire license plates.

2. *Kozup's Defense*

Kozup testified in his own defense. He explained he drove from his home in Colorado to Southern California in 2015 to attend a trade show for his job. He was taking Adderall at the time.

Kozup believed his civil rights had been violated during the July 2014 events and wanted a copy of the incident report to submit to his insurance company. He was frustrated that he was unable to obtain a copy and held Captain Davoren responsible. Kozup testified the pressure tactics he employed were used by the military. He believed playing rap music lyrics was a legitimate way to try to get the report. Kozup asserted he had no intention of coming to California from Colorado to confront LASD deputies. As to Davoren, although he acknowledged making the phone calls, Kozup said most of them had not been made when he was in California and insisted he did not intend to commit crimes against Davoren, extort money from him or physically harm him. Kozup claimed the items found in his car in Colorado were for his everyday use.

Kozup denied the vandalism charges, testifying he had seen a person driving a red Mustang slash the tires on the three cars. He believed the unknown vandal had some connection to the LASD deputy directly involved in the July 2014 events.

3. *Verdict and Sentencing*

The jury convicted Kozup on all 19 charged counts. The court sentenced Kozup to an aggregate state prison term of eight years four months. He was awarded 2,545 days (10 days less than seven years) of custody credit.

DISCUSSION

1. *The Trial Court Did Not Commit Prejudicial Error by Failing To Give Lesser Included Offense Instructions for Making Criminal Threats and Stalking*

a. *Governing law and standard of review*

The trial court has a sua sponte duty to instruct a jury on all lesser included offenses of the charged crime "if substantial evidence supports the conclusion that the defendant committed the lesser included offense and not the greater offense." (*People v. Gonzalez* (2018) 5 Cal.5th 186, 196; accord, *People v. Shockley* (2013) 58 Cal.4th 400, 403.) This requirement prevents ""'either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other.'"" (*Gonzalez*, at pp. 196-197; accord, *People v. Smith* (2013) 57 Cal.4th 232, 239-240.) However, ""'[t]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense.'"" (*People v. Williams* (2015) 61 Cal.4th 1244, 1263.) There must be evidence that a reasonable jury could find persuasive. (*Ibid.*; *People v. Barton* (1995) 12 Cal.4th 186, 201; see *People v.*

Breverman (1998) 19 Cal.4th 142, 177 (*Breverman*) [in determining "whether evidence is 'substantial' in this context, a court determines only its bare legal sufficiency, not its weight" or witness credibility].)

We review the trial court's failure to instruct on a lesser included offense de novo (*People v. Nelson* (2016) 1 Cal.5th 513, 539; see *People v. Licas* (2007) 41 Cal.4th 362, 367; *People v. Manriquez* (2005) 37 Cal.4th 547, 581), considering the evidence in the light most favorable to the defendant (*People v. Brothers* (2015) 236 Cal.App.4th 24, 30; *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137).

"[I]n a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under [*People v.*] *Watson* [(1956) 46 Cal.2d 818]. A conviction of the charged offense may be reversed in consequence of this form of error only if, 'after an examination of the entire cause, including the evidence' [citation], it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred." (*Breverman, supra*, 19 Cal.4th at p. 178.)

"'The Supreme Court has emphasized "that a 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*."'" (*People v. Campbell* (2015) 233 Cal.App.4th 148, 165.) Accordingly, while we examine only what a reasonable jury could conclude when assessing whether a court erred by failing to instruct on a lesser included offense (*Breverman, supra*, 19 Cal.4th at p. 177), under the *Watson* harmless error standard we must consider the weight of the evidence and evaluate what a reasonable jury "is *likely* to

have done in the absence of the error under consideration." (*Ibid.*)

b. *Any error in failing to instruct on attempted criminal threats was harmless*

In order to prove the completed crime of making a criminal threat as defined in section 422, the prosecution must establish: "(1) that the defendant 'willfully threatened to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

In *People v. Chandler* (2014) 60 Cal.4th 508, 525, the Supreme Court clarified the threat itself must be objectively threatening, that is, sufficient to cause a reasonable person to be in sustained fear. "Sustained fear must occur over 'a period of time that extends beyond what is momentary, fleeting, or transitory." [Citation.] Courts have held, for instance, 15 minutes satisfies the sustained fear requirement. [Citation.]

In addition, sustained fear must be objectively and subjectively reasonable." (*People v. Roles* (2020) 44 Cal.App.5th 935, 942.)

The crime of attempted criminal threat is a lesser included offense of making a criminal threat. (*People v. Chandler, supra,* 60 Cal.4th at p. 515; *People v. Toledo, supra,* 26 Cal.4th at p. 230.) A defendant properly may be found guilty of attempted criminal threat whenever he or she intends to make a criminal threat "'but is thwarted from completing the crime by some fortuity or unanticipated event.' [Citation.] 'For example, if a defendant takes all steps necessary to perpetrate the completed crime of criminal threat by means of a written threat, but the crime is not completed only because the written threat is intercepted before delivery to the threatened person, the defendant properly may be found guilty of attempted criminal threat. Similarly, if a defendant, with the requisite intent, orally makes a sufficient threat directly to the threatened person, but for some reason the threatened person does not understand the threat, an attempted criminal threat also would occur. Further, if a defendant, again acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat.'" (*Chandler,* at p. 515.)

Kozup contends there is substantial evidence in the record that would support findings his threatening telephone calls to Captain Davoren did not cause Davoren to be in sustained fear for his own safety or that of his immediate family. Kozup points

primarily to evidence that Davoren remained at work notwithstanding the threats, continuing his usual routine and staying in his home at night. While Davoren testified at some length concerning his fear of Kozup, particularly after he learned of the vandalism near his former residence, Kozup argues the jury could have disbelieved that testimony, as well as the testimony of Davoren's lieutenants who had described Davoren as upset and scared during the period the calls were being made.[5]

Even if Captain Davoren was frightened by the threatening calls, Kozup also argues, the jury could have found his fear was unreasonable. Kozup notes he was in Colorado when many of the calls were made, Davoren worked inside an "armed fortress" and at least some of the threats were so outlandish as to be unbelievable.[6] Accordingly, Kozup asserts, it was error for the

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[5] Defense counsel made this point in his closing argument to the jury: "Basically, what did Captain Davoren know about my client? He knew everything. Immediately after the calls, we know Detective Bednar was tasked to investigate. We know Lieutenant Royal had already started investigating the background of my client. There was G.P.S. pings. Early in the stage, he knew everything about my client. So, when my client makes these threats, does Captain Davoren really believe—again, does he really believe that this individual, that he's already researched and knows he's in Colorado at that point on the 3rd—is he really going to come and chop off his head and take it back to Colorado? He doesn't believe that. No one can believe that. When's the last time a captain of a law enforcement agency in the U.S. had their head chopped off, taken off as a trophy? It doesn't happen. It's just a form of communication."

[6] In his closing defense counsel argued, "Was it reasonable for him to believe it if, in fact, he did? It's not. In this situation, he was surrounded by deputies armed to the teeth at a station

court to fail to instruct sua sponte on the lesser included offense of attempted criminal threats.

We agree with Kozup, given the bizarre nature of many of the threatening telephone calls, a reasonable jury could have found Captain Davoren did not experience sustained fear as to at least one of the 14 calls charged as violations of section 422 or, alternatively, that any fear he experienced was not reasonable. However, viewing the record as a whole, it is not reasonably probable a jury instructed as to the lesser included offense of attempted criminal threat would have reached a verdict more favorable to Kozup. (See *Breverman, supra*, 19 Cal.4th at p. 177 [in evaluating whether the failure to give a lesser included offense instruction is prejudicial error, "an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result"].)[7]

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that my client could not access. It's not reasonable for him to believe that my client is going to actually follow through and come the next day to the station and believe Captain Davoren is going to give him $85,000."

[7] Emphasizing the difference between finding error in failing to instruct sua sponte on a lesser included offense and determining the error was prejudicial and therefore reversible, the *Breverman* Court explained, "Nor can it be said that an erroneous failure to instruct on a lesser included offense is *necessarily* prejudicial, on the premise that if the evidence was substantial enough to warrant lesser offense instructions in the first place, it must have been strong enough to affect the outcome had the instructions not been omitted. In fact, the two standards

The evidence Captain Davoren and other personnel at the LASD Lost Hills station believed Kozup meant to carry out his threats and took them seriously was overwhelming. Davoren testified not only that he was frightened by Kozup's graphic threats to decapitate him, which was confirmed by Lieutenant Mathers, but also that he moved his family from their home to protect them from Kozup. The station was placed on high alert. Armed deputies in tactical gear were posted on the roof of the station to watch for suspicious individuals and activities. Desk personnel were ordered to stay behind bullet-proof glass. And Kozup's apparent use of a large knife or machete to vandalize cars adjacent to what he had thought was Davoren's home immediately before he started the series of threatening phone calls certainly made Davoren's fear of serious physical harm a reasonable one.

In addition, the jurors heard recordings of several of Kozup's calls, permitting them to evaluate his tone, as well as the content of the threats, and saw both Davoren and Kozup testify, allowing them to assess the two men's demeanor as witnesses. Against this wealth of evidence, Kozup's argument Davoren was lying about his reaction to the threats, fully presented as part of Kozup's defense to the charges, fails to establish a reasonable probability a more favorable result would have been achieved if the lesser included offense instruction had been given.

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of evidentiary review are distinct." (*Breverman, supra*, 19 Cal.4th at p. 177.)

c. *Any error in failing to instruct on attempt to stalk was harmless*

Section 646.9, subdivision (a), provides, "Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking." Subdivision (g) of section 646.9, in turn, provides, for purposes of the section, "'credible threat' means a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat."[8]

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[8] CALCRIM No. 1301, as given by the trial court, instructed the jury in part, "To prove that the defendant is guilty of this crime, the People must prove that: 1. The defendant willfully and maliciously harassed or willfully, maliciously, and repeatedly followed another person; [¶] AND [¶] 2. The defendant made a credible threat with the intent to place the other person in reasonable fear for his safety or for the safety of his immediate family. [¶] A credible threat is one that causes the target of the threat to reasonably fear for his or her safety or for the safety of his or her immediate family and one that the maker of the threat appears to be able to carry out."

Kozup argues there was sufficient evidence for the jury to find he did not intend to place Captain Davoren in reasonable fear for his safety or did not have the apparent ability to carry out his threats and, as a result, the trial court had a sua sponte duty to instruct on the lesser included offense of attempted stalking.[9] With respect to the first of these two assertions, however, if Kozup did not intend to place Davoren in reasonable fear for his safety, he was not guilty of either stalking or attempted stalking. Specific intent is not only an element of stalking (*People v. Carron* (1995) 37 Cal.App.4th 1230, 1233) but also a necessary element of an attempt to commit that crime.

Although stalking and making a criminal threat share several elements, neither offense is a lesser included offense of the other: "If the defendant threatens the victim with the intent to place the victim in reasonable fear for either the victim's safety or the safety of the victim's immediate family, *but the threat does not include a threat of great bodily injury or death*, and the defendant satisfies the other elements of stalking, then the defendant commits stalking but does not commit a criminal threat. A defendant can also make a criminal threat without committing stalking if the defendant threatens the victim with great bodily injury or death but does not willfully or maliciously repeatedly follow or harass the victim." (*People v. Cruz* (2020) 46 Cal.App.5th 715, 733.)

[9] Kozup asserts in his opening brief, "There were questions whether appellant really meant what he said and whether he had the apparent ability to do it." In arguing the trial court erred in failing to instruct on attempted stalking, however, Kozup does not contend, as he did with respect to the counts charging him with making criminal threats, the jury could have found the crime was only an attempt because he did not cause Captain Davoren to reasonably fear for his safety.

(§ 21a ["[a]n attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission"]; see *People v. Fontenot* (2019) 8 Cal.5th 57, 68 ["'[b]ecause the act constituting a criminal attempt "need not be the last proximate or ultimate step toward commission of the substantive crime," criminal attempt has always required "a specific intent to commit the crime"'"].) Weak or insufficient evidence Kozup intended to place Davoren in reasonable fear for his safety would not require a sua sponte instruction on attempt.

Kozup's contention the absence of an instruction on attempted stalking was prejudicial error because the jury could have found he took all steps necessary to perpetrate the crime, including acting with the requisite intent, but lacked the apparent ability to carry out his threats, also fails. While some of Kozup's messages for Captain Davoren were bizarre, in light of the undisputed evidence Kozup traveled back and forth between his home in Colorado and Southern California during the relevant time period, including going to the vicinity of the LASD Lost Hills station, and the overwhelming evidence he had engaged in acts of vandalism near Davoren's former home using a large knife or machete, even if an attempt instruction had been given, it is not reasonably probable the jury would have reached a result on the stalking charge more favorable to Kozup.

2. *Substantial Evidence Supports Kozup's Convictions for Felony Vandalism*

Vandalism—maliciously defacing with graffiti, damaging or destroying real or personal property not the actor's own (§ 594, subd. (a))—may be either a felony or misdemeanor depending on the value of property destroyed. Vandalism is a wobbler, a felony

or a misdemeanor, "[i]f the amount of defacement, damage, or destruction is four hundred dollars ($400) or more" (§ 594, subd. (b)(1); see *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 906, fn. 14); it is only a misdemeanor if the amount of defacement, damage or destruction is less than $400 (§ 594, subd. (b)(2)).

At trial Special Agent Peaco testified two tires on his personal vehicle (a Chevy Suburban) had been slashed, two tires on one of the FBI vehicles parked at his home (a Chevy Tahoe, the official car he used) had been slashed, and three tires on the second FBI vehicle parked at his home (a Dodge Charger, the official car used by his wife, also a special agent) had been slashed. Peaco paid $90 to have his personal vehicle towed to a nearby tire service center and $172.42 for each replacement tire, plus labor charges of several hundred dollars. Jason Lefebvre, an equipment specialist for the FBI with responsibility for maintaining the vehicle fleet for the Los Angeles field office, testified each of the two replacement tires on the Tahoe cost $165.86 and each of the three replacement tires on the Charger cost $114.75. Lefebvre also testified he spent one hour replacing the tires on the Tahoe and two hours replacing the tires on the Charger.[10] Lefebvre was an hourly worker in 2015, not a salaried employee of the FBI; he was paid $25.38 per hour. An FBI supply technician testified the FBI paid a towing company $300 to tow the Tahoe and $300 to tow the Charger to the FBI garage.

The court instructed the jury, if it found Kozup guilty of vandalism for any of the three counts charged, it must then

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[10] Lefebvre testified he replaced all four tires on the Charger, explaining it would not be safe to replace only three of the tires on a high-performance vehicle.

decide "whether the People have proved that the amount of damage caused by the vandalism in each count was $400 or more."[11] The jury's guilty verdicts on each of the three vandalism counts also found true "the allegation that the amount of damages exceeds $400."

Kozup contends the evidence was insufficient to support the jury's true finding the damage to each vehicle was $400 or more, arguing towing and labor costs are not properly included in determining the amount of damage caused by his acts of vandalism.[12] As Kozup explains, in *People v. Farell* (2002) 28 Cal.4th 381, in analyzing a Penal Code provision requiring imposition of a minimum jail term as a condition of probation for theft offenses when the amount stolen exceeded $100,000, the Supreme Court explained, "the word 'amount' may be understood to refer to the value of an item" (*id.* at p. 388), and went on to observe, as an example, "'amount' refers to value" in section 594 (*id.* at p. 389; see *Sangha v. LaBarbera* (2006) 146 Cal.App.4th 79, 89 [classification of vandalism as a felony or misdemeanor "turns on the value of the property damaged or destroyed"]). The

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[11] The instruction also informed the jury the People have the burden of proving the allegation concerning the amount of the damage beyond a reasonable doubt.

[12] Although Kozup characterizes his challenge to the felony vandalism convictions as based on insufficient evidence, he, in effect, argues the trial court misinterpreted section 594 by permitting evidence of the cost of replacing the damage tires, rather than limiting the People to evidence of the decrease in actual value of the tires that were damaged by his acts of vandalism. We review questions of statutory interpretation de novo. (*United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (2018) 4 Cal.5th 1082, 1089.)

cost of new tires in this case—the amount or value of the damage he had caused within the meaning of section 594, subdivision (b), Kozup asserts—was under $350 for each of the three vehicles. Accordingly, his felony vandalism convictions cannot stand.

Kozup's argument is not supported by case law, which recognizes cost-of-repair as a proper basis for determining the amount of damage caused by an act of vandalism. In *In re Kyle T.* (2017) 9 Cal.App.5th 707 this court reversed a juvenile adjudication of felony vandalism, holding the People had failed to present sufficient evidence, specific to Kyle's acts of vandalism, demonstrating the actual amount of damage he had caused reached the felony vandalism threshold of $400. (*Id.* at p. 709.) Explaining that an officer's recitation of the average cost of graffiti removal based on a generic, one-page cost list was not an acceptable method of proving the amount of damage from specific acts of vandalism,[13] we held, "The most obvious way for the People to prove that Kyle committed felony vandalism would have been to introduce at the adjudication hearing an invoice setting forth the actual cost of repairs to the two properties." (*Id.* at pp. 713-714.) We also suggested "a contractor's estimate of the cost to repair the actual damage that Kyle caused might have sufficed, again assuming proper authentication and foundation." (*Id.* at p. 714.) Similarly, in *People v. Carrasco* (2014) 209 Cal.App.4th 715, 718, the court of appeal used the cost to repair broken car windows and a broken house window as the basis for its analysis of the defendant's conviction for felony vandalism. (See also *In re A.W.* (2019) 39 Cal.App.5th 941, 945

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[13] The testifying officer did not create the list and was not able to explain how it was prepared. (*In re Kyle T.*, *supra*, 9 Cal.App.5th at p. 715.)

[explaining that average cleanup costs for graffiti could not be used to prove the actual damage caused by a minor's vandalism because "[t]he use of an average, or arithmetic mean, recognizes that cleanup costs for some graffiti is less than the average, and the cleanup costs for other graffiti exceeds the average. The average cleanup cost is untethered to the actual damage caused by minor"].)

The use of cost to repair or replace the damaged items, as was done in the case at bar, rather than the fair market value of the damaged items in the condition they were in when vandalized, is also consistent with restitution statutes, which allow courts to award restitution to victims of vandalism for "'the replacement cost of like property, *or the actual cost of repairing the property when repair is possible*.'" (*People v. Stanley* (2012) 54 Cal.4th 734, 737.)

The People presented undisputed evidence the cost of replacing the damaged tires on each of the three vehicles was $400 or more. Therefore, substantial evidence supported the three felony vandalism convictions.

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

SEGAL, J. FEUER, J.